No. 496

IN THE

Supreme Court of the United States

October Term - 1965

JAMES RUSSELL HEAPS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RETURN TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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PETITIONER WAS NOT DENIED THE EFFECTIVE AID OF COUNSEL.

Petitioner has set forth as one of the grounds for the Writ of Certiorari that he was denied equal protection of the law because the State of California allowed the objective evidence of his condition of sobriety to disappear. This is not true. Approximately two hours following petitioner's arrest, his counsel arrived at the city jail in the City of Long Beach, accompanied by a medical technician. This technician

was permitted to draw a sample of petitioner's blood for testing purposes to determine petitioner's state of sobriety.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BECAUSE ORAL TESTIMONY CONCERNING THE OBJECTIVE RESULTS OF A SOBRIETY TEST WAS ALLOWED.

Petitioner relies, for this ground, upon the case of *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977. The instant case is distinguishable upon its facts from that case. First, in *Escobedo* the court was dealing with a confession, while in the instant case we are dealing with objective physical symptoms. Second, in *Escobedo* the court held that the defendant must be afforded the right to counsel as soon as "the process shifts from the investigatory to the accusatory stage." There the court distinguished between the two phases of a case. What they were guarding against was a defendant implicating himself in a crime by his own statement without the advice of counsel after he had been taken into custody. In a case such as the instant one there necessarily must be some investigation into the suspect's condition. These "field sobriety tests" comprise that investigation. It is only after the results of these tests have been observed and an opinion reached by the examiner does the case shift to the accusatory phase.

It is submitted that unlike a confession wherein the defendant links himself to a crime, here the defendant is linked to the crime by the observations of a second party of the defendant's conduct.

THERE WAS NO IMPROPER INTRODUCTION INTO EVIDENCE OF AN INCRIMINATORY STATEMENT OF PETITIONER.

Petitioner states on page 4 of his petition that the Booking Sergeant testified to petitioner's admission that he had five martinis. This is not true. Reference is made here to the "Engrossed Statement on Appeal" filed in the Appellate Department of the Superior Court. (Appendix B of the Petition) There it will be seen that no statement made by the petitioner to the police was introduced against him. It was only after he testified on direct examination that he had had one or two drinks that he was asked on cross-examination if it wasn't true that he told the Booking Sergeant he had five martinis. The petitioner answered that he could have so stated. (See pages 3a-4b of Petition)

It is submitted that this is admissible since it is done for purposes of impeachment made necessary by the petitioner's own contradictory testimony. An analogous situation has been approved by the Supreme Court of the United States in *Walder v. United States*, 347 U.S. 62, 98 L. Ed. 503. That case involved unlawfully obtained evidence offered to impeach the defendant. The court stated:

> "It is one thing to say that the government cannot make affirmative use of evidence unlawfully obtained. It is quite another thing to say that the defendant can turn the illegal method by which evidence in the government's possession was obtained to his own advantage and provide him with a shield against contradiction of his untruths. Such an extension of the *Weeks* doc-

trine would be a perversion of the Fourth Amendment."

It is submitted that the same theory should apply here. A similar extension of the *Escobedo* doctrine to insulate the petitioner against contradiction of his own untruths would be a perversion of the Sixth and Fourteenth Amendments.

CONCLUSION

In conclusion it is urged that the petitioner was not denied Due Process of Law and the Effective Aid of Counsel and the Writ should be denied.

Respectfully submitted,

JAMES T. STARR
City Prosecutor

ROBERT W. PARKIN
Deputy